(2)

No. 06-596

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In The

Supreme Court of the United States

GEOFFREY N. FIEGER,

Petitioner,

v.

MICHIGAN GRIEVANCE ADMINISTRATOR,

Respondent.

On Petition For A Writ Of Certiorari To The Michigan Supreme Court

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTION PRESENTED

Michigan's Rules of Professional Conduct require lawyers to treat with courtesy and respect all persons involved in the legal process and prohibit lawyers from engaging in undignified or discourteous conduct toward the tribunal. Petitioner on two separate occasions broadcast out-of-court vulgarities about the appellate judges who were hearing his client's appeal. Can Petitioner be subjected to professional discipline for discourtesy without offending the First Amendment?

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REASONS FOR NOT GRANTING THE WRIT

I. Lawyer Speech, Defamatory Or Otherwise, Is Constitutionally Subject To Regulation During Pending Appellate Proceedings.

The Michigan Supreme Court's opinion upholding Petitioner's disciplinary reprimand for out-of-court discourteous remarks he broadcast about the judges hearing his client's appeal is compatible with every United States Supreme Court decision involving state regulation of lawyer speech, including *Gentile v State Bar of Nevada*, 501 US 1030 (1991). None of those prior decisions can be considered directly on point, given the audacious quality of Petitioner's remarks, the fact that they were made during a pending appeal, and the unique nature of Michigan's lawyer courtesy rules. Nevertheless, the balance struck in Petitioner's case between his professional obligation of courtesy and his First Amendment right of free speech was constitutionally appropriate. If, as Petitioner claims, his case poses a First Amendment question that has remained open for years, it does so simply because Petitioner went where no lawyer has dared to go before. That is no reason to grant a writ of certiorari.

Petitioner emphasizes that his remarks were made during appellate proceedings, not during trial, and that his remarks were merely nondefamatory opinions, not false statements of fact. These are distinctions of no significance.

This Court has never held that regulation of lawyer speech is permissible only in the context of a pending trial. *Gentile* cannot reasonably be read to support that proposition, and *Gentile's* references to a "pending trial" and to "remarks that produce a substantial likelihood of material prejudice" are simply reflections of the terms used by the

Nevada's disciplinary rule which was challenged in that case. This Court never formulates a rule of constitutional law broader than is required by the precise facts to which it is applied, *McConnell v Federal Election Comm'n*, 540 US 93 (2003), and its decision in *Gentile* would have been specific to the disciplinary rule before it.

Chief Justice Rehnquist's portion of the majority opinion in *Gentile* examined the Supreme Court's prior holdings concerning the regulation of attorney speech and found that they "expressly contemplated that the speech of *those participating before the courts* could be limited," 501 US at 1072 (emphasis in original), and "plainly indicate that the speech of lawyers representing clients *in pending cases* may be regulated under a less demanding standard than that established for regulation of the press." 501 US at 1074 (emphasis supplied). One would expect to find phrases less open-ended than "participating before the courts" and "in pending cases" if the *Gentile* majority intended to declare off limits any regulation of lawyer speech beyond the trial stage. Moreover, Chief Justice Rehnquist had no reason (if one accepts Petitioner's interpretation of *Gentile*) to quote *In re Sawyer*, 360 US 622 (1959), to the effect that "even outside the courtroom, lawyers in pending cases were subject to ethical restrictions on speech to which an ordinary citizen would not be." 501 US at 1072.

This Court also has never held that nonfactual assertions, *per se*, enjoy First Amendment protection in every imaginable legal setting. The legal protection which is afforded to nonfactual assertions is a doctrine that originated in defamation law. The legitimate state interest underlying the law of defamation is the compensation of individuals for the harm inflicted on them by defamatory falsehood. *Gertz v Robert Welch, Inc.*, 418 US 323 (1974).

An action for defamation is designed to vindicate a person's reputation. Nonfactual assertions cannot by definition be accepted as true by reasonable persons, or cause them to think less of the target of such remarks. The target's reputation cannot be damaged by nonfactual assertions so no cause of action for defamation can be maintained.

Importing the doctrine of nonfactual assertions into the law of lawyer discipline makes sense only for rules of professional conduct which are concerned with truthful communications or with a person's reputation or integrity. For example, if a lawyer was prosecuted for false statements concerning the qualifications or integrity of a judge, or if a judicial candidate was prosecuted for false communications, it would be relevant that the statements or communications in question were nonfactual assertions. Any relevance disappears when the doctrine is taken outside the defamation context and used to analyze alleged violations of disciplinary rules which do not involve elements of untruthfulness or damage to someone's reputation.

Michigan's courtesy rules reflect the interests of the Michigan Supreme Court in vindicating the good moral character of the lawyers it has licensed as well as promoting respect for the judiciary and maintaining the integrity of the judicial process. Neither rule requires a showing that false statements were made or that a person's integrity was impugned. Whether Petitioner's comments could be taken as factual is irrelevant; the issue is whether they were discourteous.

None of the cases relied on by Petitioner from the Ninth Circuit and from the highest courts in Colorado,

Oklahoma, and Tennessee dealt with the violation of a courtesy rule. In each of those four cases the charges of misconduct were understood to involve the impugnation of a judge's integrity. Any apparent conflict between those cases and Petitioner's case is attributable to the specific theories of misconduct that were available to and pursued by disciplinary counsel, not to inconsistent judicial doctrines. It is no evidence of a deep split of authority calling for this Court's attention.

The lesson of *Gentile* is clear: "When a state regulation implicates First Amendment rights, the Court must balance those interests against the State's legitimate interest in regulating the activity in question." 501 US at 1075. This is what the Michigan Supreme Court did. The balancing process it employed in no way represents a departure from any of this Court's prior holdings.

II. The First Amendment Was Not Offended By Finding, On Balance, That Petitioner's Obligation Of Courtesy Outweighed His Interest In Broadcasting Vulgar Remarks About The Judges Hearing His Client's Appeal.

When Petitioner broadcast his vulgar remarks about the judges hearing his client's appeal, he did so not just as a citizen or radio show host, but as a lawyer actively participating in the appeal itself. He was, in other words, an officer of the court. A State's interest in regulating lawyers is especially great precisely because lawyers are officers of the court. *Goldfarb v Virginia State Bar*, 421 US 773 (1975).

The practice of law may not be a matter of grace, but it is restricted to those who are qualified by learning and

moral character. *Baird v State Bar of Arizona*, 401 US 1 (1971). States have a constitutionally permissible and substantial interest in determining whether an applicant possesses the character and general fitness to be an attorney. *In re Griffiths*, 413 US 717 (1973). A State's interest in an attorney's character and general fitness continues beyond the point of admission.

This Court declared, in *Bradley v Fisher*, 80 US 335, 355 (1871), that an attorney is obliged "not merely to be obedient to the Constitution and the laws, but to maintain at all times the respect due to courts of justice and judicial officers. This obligation is not discharged by merely observing the rules of courteous demeanor in open court, but it includes abstaining out of court from all insulting language and offensive conduct toward the judges personally for their judicial acts."

More recently this Court, in *In re Snyder*, 472 US 634, 647 (1985) said "all persons involved in the judicial process – judges, litigants, witnesses, and court officers – owe a duty of courtesy to all other participants. The necessity for civility in the inherently contentious setting of the adversary process suggests that members of the bar cast criticism of the system in a professional and civil tone."

This well-settled obligation of courtesy on the part of lawyers involved in pending cases does not prohibit lawyer criticism. Michigan's courtesy rules are content neutral. The Michigan Supreme Court explicitly recognized Petitioner's right of criticism. Thus, under *Gentile*, the interest to be weighed against Petitioner's obligation of courtesy is not his right of criticism as such, but his right to criticize discourteously.

It is questionable whether Respondent's remarks even have any value as speech in a constitutional sense. The Constitution protects communications, not every utterance. *Roth v United States*, 354 US 476 (1957). It has long been recognized that certain classes of speech are outside the protective scope of the First Amendment. Political expression, of course, occupies the core of the protection afforded by the First Amendment. *Meyer v Grant*, 486 US 414 (1988). At the periphery, but still protected to a lesser extent, is commercial speech. *Bates v State Bar of Arizona*, 433 US 350 (1977). This protective scope has its limits, however, because the First Amendment, while fundamental, is not absolute. *Ashcroft v ACLU*, 535 US 564 (2002).

"There are," said this Court in *Chaplinsky v New Hampshire*, 315 US 568, 571-72 (1942), "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem." *Chaplinsky* continued:

> These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words – those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. [*Id.* at 572].

The First Amendment's primary aim is the full protection of speech upon issues of public concern. *Connick v Myers*, 461 US 138 (1983). A "resort to epithets or personal

abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution . . . " *Cantwell v Connecticut*, 310 US 296, 309-10 (1940).

Even if Petitioner's remarks could be assigned some minimal value as speech for constitutional purposes, their timing is problematic. First Amendment jurisprudence rests largely on the preference for a marketplace of ideas in which the free play of counter-argument and education exposes errors in judgment or unsubstantiated opinions, as opposed to government regulation. See, e.g., *Wood v Georgia*, 370 US 375 (1962).

As this Court explained in *Gertz*, "the first remedy of any victim of defamation is self-help using available opportunities to contradict the lie or correct the error. Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals enjoy." 418 US at 344.

In the instant case, the opportunities envisioned by *Gertz* to contradict Petitioner's remarks were not ethically available to the appellate judges he targeted. This Court has disapproved of state regulations which give one side of a debatable public question an advantage in expressing its view to the people. See, e.g., *R.A.V. v St. Paul*, 505 US 377; *First Nat. Bank of Boston v Bellotti*, 435 US 765 (1978). Petitioner's attempt to conduct his one-sided war of words is no less a skewing of public debate and should be deemed equally offensive to the First Amendment.

Petitioner says his remarks are core political speech, but the difference between his remarks and core political speech is as great as the difference noted by Mark Twain

between the lightning bug and lightning. There was no political campaign underway, nor was Petitioner attempting by his comments to participate in a political campaign. The statement in Justice Kennedy's concurrence in *Republican Party of Minnesota v White*, 536 US 765 (2002), regarding an elected judiciary was aimed at a state regulation abridging speech during a judicial campaign. Michigan's courtesy rules plainly do not apply to political campaigns.

CONCLUSION

Therefore, Respondent Michigan Grievance Administrator requests that this Court deny the petition for a writ of certiorari.

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Respectfully submitted,

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